

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROLYN DUTRO)	
Claimant)	
VS.)	
)	Docket No. 255,452
RUSSELL STOVER CANDIES)	
Respondent)	
AND)	
)	
HARTFORD ACCIDENT AND INDEMNITY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the August 11, 2000 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

This is a claim for a repetitive series of traumas commencing November 1999 and continuing each and every working day through claimant's last day of work in March 2000.¹ In the August 11, 2000 Order, which is the subject of this appeal, Judge Avery found that claimant either injured or aggravated her shoulder while working for respondent and that she gave respondent timely notice of the accidental injury.

Respondent and its insurance carrier contend Judge Avery erred. They argue that claimant failed to prove that she injured her shoulder at work and that she failed to provide respondent with timely notice of the injury. Those are the only issues before the Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Appeals Board finds:

¹ Claimant's E-1, the Application for Hearing, designates February 28, 2000, as the date of accident. But claimant's attorney announced at the preliminary hearing that claimant's repetitive use injury commenced November 1999 and continued through the last day of work, which from the records introduced at hearing appears to be sometime in March 2000 when claimant was first placed on leave.

1. The preliminary hearing Order should be affirmed.
2. In October 1998, claimant began working for respondent, a candy manufacturer. While performing the duties involved in boxing packaged candy and placing those boxes on pallets, claimant developed symptoms in her neck and right shoulder. In November 1999, claimant saw Dr. Marion H. Baker with complaints of occasional right shoulder pain and was diagnosed as having possible cervical nerve impingement. Claimant continued to perform her job duties, which required her to routinely lift boxes weighing approximately 15 pounds, and her shoulder symptoms increased. The medical records introduced into evidence at the preliminary hearing indicate that claimant sought additional medical treatment for the pain in her neck and right shoulder in March 2000.
3. The Appeals Board affirms the Judge's finding that for preliminary hearing purposes claimant has proven that she either injured or aggravated her right shoulder and neck while working for respondent. That conclusion is supported by claimant's testimony along with the expert medical opinion of orthopedic surgeon Dr. Edward J. Prostic.
4. The Appeals Board also affirms Judge Avery's finding that claimant provided respondent with timely notice of the accidental injury. Claimant testified that she told her supervisor, Judy Whitworth, on or about February 28, 2000, that she had injured herself at work and that Ms. Whitworth responded by sending claimant to the company nurse. Ms. Whitworth did not testify and, therefore, that testimony is uncontroverted. The Judge found claimant's testimony persuasive and so does the Appeals Board.
5. An injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.² The test is not whether the accident caused the condition, but whether the accident aggravated or accelerated a preexisting condition.³
6. Workers have the burden of proof to establish their rights to compensation and to prove the various conditions upon which those rights depend.⁴
7. "Burden of proof" means the burden to persuade by a preponderance of the credible evidence that a party's position on an issue is more probably true than not when considering the whole record.⁵

² *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

³ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

⁴ K.S.A. 1999 Supp. 44-501(a).

⁵ K.S.A. 1999 Supp. 44-508(g).

8. Because claimant has proven that she either aggravated or injured her right shoulder and neck while working for respondent and that she provided respondent with timely notice of that injury, the request for preliminary hearing benefits should be granted.

9. As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁶

WHEREFORE, the Appeals Board affirms the August 11, 2000 preliminary hearing Order entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of October 2000.

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
Brenden W. Webb, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director

⁶ K.S.A. 1999 Supp. 44-534a(a)(2).